Briar Crest Nursing Home *and* 1199 National Health & Human Service Employees Union. Cases 2–CA–30131, 2–CA–30258, 2–CA–30283, 2–CA–30993, and 2–CA–31167

April 12, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On August 28, 1998, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs, and the Charging Party filed exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

Our dissenting colleague disagrees with the judge's findings that the Respondent violated Section 8(a)(3) by eliminating employee Patrick Duncan's hours of work and by discharging employee Tessie Cherry. For the following reasons, we agree with the judge.

1. Duncan began working for the Respondent as a licensed practical nurse in August 1996. Duncan believed he was being hired for a full-time position. A day or two before he began work, however, Director of Nursing Barbara Rusinko informed him that the position had not been approved and she could only offer him per diem work. Duncan accepted the per diem position.

It is clear that Rusinko was aware Duncan continued to want a full-time position. In November or December 1996, Duncan received an evaluation. The only negative comment in the overall positive evaluation was that Duncan had refused to work weekends. Duncan replied in writing that he refused to work weekends because he was a per diem employee. He added that "should administration want my services to include holidays—as is expected of full-time staff members with benefits—then I am open to discussions concerning my classification."

In January 1997, the Respondent hired Velda King as a licensed practical nurse. The Respondent did not offer this position to Duncan.

In early February 1997, Rusinko summoned Duncan to her office to tell him that Sabrina Allen had been hired as a full-time employee and that there would not be much work for him after February. Duncan asked why he had not been notified of the opening because Rusinko knew that he was interested in a full-time position with benefits. Rusinko replied that a notice had been posted. Duncan and two other employees testified that they had not seen the posting. Rusinko asked Duncan whether he wanted to give up his per diem position or remain on the on-call list. Duncan replied that he wanted to remain on the on-call list.

Notwithstanding his wish to remain on the on-call list and his frequent calls requesting work, Duncan was not called back to work after February 14, 1997. Rusinko admitted at the hearing that Duncan was no longer on the on-call list, and she could not recall when his name was removed from the list. Rusinko also admitted that Lynette Hunter, another on-call licensed practical nurse, had continued to work per diem after Allen was hired.

In addition to King and Allen, the Respondent hired other full-time licensed practical nurses without informing Duncan of the openings. When licensed practical nurse Elaine Barkley resigned in March 1997, the Respondent did not contact Duncan about this opening. After learning from another employee that Barkley's position had been posted, Duncan called Rusinko to inquire whether there were any hours available. Rusinko replied that there were not. When Duncan asked about the posting for the full-time position, Rusinko agreed to interview him the next day.

At the interview, Rusinko informed Duncan that she was not interviewing him for a full-time position. Instead, she offered him work on weekends and holidays. Duncan testified that he had never seen such a schedule. When Duncan asked about the full-time position, Rusinko told him that she had filled it that morning.

During the remainder of 1997, the Respondent hired at least two more licensed practical nurses. Duncan was not contacted about these positions, even though his application remained on file.

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Charging Party has excepted, inter alia, to the judge's failure to find that Supervisor Nancy Pupino unlawfully interrogated Patrick Duncan. No such violation was alleged in the complaint, and the issue was not fully litigated at the hearing. Accordingly, we find no merit in the exception.

[3] We shall order the Respondent to rescind the unilateral change to employee work schedules, which the judge inadvertently omitted from the recommended Order. We shall also modify the recommended Order to comply with the Board's decision in *Indian Hills Care Center,* 321 NLRB 144 (1996), as modified by *Excel Container,* 325 NLRB 17 (1997).

The complaint alleged that the Respondent violated Section 8(a)(3) by eliminating Duncan's scheduled work hours in February 1997. The General Counsel has the initial burden of establishing that protected activity was a motivating factor in the Respondent's elimination of Duncan's work hours. The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, and employer animus. Once such unlawful motivation is shown, the burden shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); and *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

The Respondent does not dispute that Duncan participated in union activity of which it was aware. The Respondent argues, however, that there is no nexus between Duncan's union activity and the elimination of his work hours.

The Respondent is arguing, in essence, that the General Counsel failed to establish that the decision to reduce Duncan's hours was discriminatorily motivated. This argument overlooks the threats the Respondent made during the election campaign. In October and November 1996, the Respondent's owner threatened to close the business if employees selected the Union as their bargaining representative, threatened employees with discharge if they engaged in campaigning on company property, and created the impression that employee union activity was under surveillance.

The judge drew the connection between the Respondent's expression of animus and the elimination of Duncan's hours: An employer who campaigns against its employees' union organizing efforts by threatening to discharge them and to close his business would have no difficulty resorting to illegal means to rid itself of a union supporter and thereby improve its chances of defeating the union in the rerun election it was seeking.[4] Thus, in agreement with the judge, we find that the General Counsel has established that the Respondent's antiunion animus was a motivating factor in the decision to eliminate Duncan's work hours.

Accordingly, we now turn to the issue of whether the Respondent has shown that it would have taken the same action even in the absence of Duncan's union activities. In his discussion of the Respondent's motivation for eliminating Duncan's work hours, the judge considered the Respondent's explanations for its actions, including its failures to offer Duncan a full-time position.[5]

The Respondent explained to Duncan that it wanted to hire more full-time employees and rely less on per diem employees. The record shows, however, that the Respondent's actions contradicted this explanation. After claiming that it wanted to replace per diem employees with full-time employees and hiring King and Allen, the Respondent continued to employ Hunter as a per diem employee even though Hunter had full-time employment elsewhere.

The Respondent's claim that it wanted to hire more full-time employees puzzled the judge for an additional reason: Why repeatedly hire and train new employees when Duncan was available and qualified? Duncan was a good employee, had expressed an interest in full-time employment,[6] and was already working almost full time.[7] Yet, on at least five occasions, commencing shortly after Duncan had repeated to the Respondent his desire to work full

[4] Nonprofessional employees, including licensed practical nurses (LPNs), voted for the Union in a representation election in November 1996, after which the Respondent filed objections. These objections remained pending until June 1997 when the Board certified the Union.

[5] Contrary to the Respondent's contention that the judge created a theory for the case that the General Counsel did not argue, the General Counsel relied heavily on the lack of a satisfactory explanation for failing to offer Duncan a full-time position as evidence that the Respondent desired to prevent Duncan from working at all.

[6] Duncan interviewed for a full-time position and, after being hired, complained about working per diem when he wanted a full-time position. It is clear the judge believed that Duncan was interested in a full-time job and that the Respondent knew this.

Our colleague, however, claims the judge found that Duncan did not express an interest in the full-time jobs for which King and Allen were hired. Our colleague is apparently referring to the judge's statement that the Respondent "did not consider Duncan for the full-time positions that were offered in January 1997 to either Sabrina Allen or Velda King, ostensibly because after posting a notice, Duncan did not express any interest in the positions."

When viewed in context, it is obvious that our colleague is misreading the judge's statement. The judge is not making a finding about whether Duncan expressed interest in the jobs. Rather, the judge is restating the Respondent's position for why it did not contact Duncan. Further, the judge's use of *ostensibly* signals doubt about the Respondent's claim that Duncan had expressed no interest in the jobs. Finally, two paragraphs later in his decision, the judge states that he does not believe the Respondent's claim that Duncan had expressed no interest in the jobs.

[7] The judge found that Duncan generally worked 3 to 4 days a week.

time, the Respondent filled full-time positions without inquiring whether Duncan was interested.[8]

The judge found that the Respondent established no satisfactory reason for failing to hire Duncan for one of the full-time positions. The judge considered this failure grounds for inferring that the Respondent acted with unlawful motivation in eliminating Duncan's hours. Cf. *Williams Contracting,* 309 NLRB 433 fn. 2 (1992) (judge may infer unlawful motivation when the proffered reasons for an action are false even in the absence of direct evidence of motivation).

In sum, the judge found that animus existed based on the Respondent's antiunion statements before the election, that the Respondent knew of Duncan's support for the Union, that the Respondent acknowledged Duncan's good job performance, and that the Respondent offered no satisfactory explanation for eliminating Duncan's work hours. These findings led the judge to conclude that the Respondent had decided to eliminate Duncan's work hours and accomplished this goal by hiring others to work in his stead. We agree. Accordingly, we adopt the judge's conclusion that the elimination of Duncan's work hours was discriminatorily motivated in violation of Section 8(a)(3).[9]

2. In December 1997, employees represented by the Charging Party engaged in a 2-day strike. Employee Olga Mascary testified that, during the strike, striking employee Cherry commented that if Mascary went to work during the strike, Cherry would "get [striking employee] Lucretia Elibox-Jupierre on her tail." Employee Heather Townsend testified that Cherry told her, "[S]he's [Cherry's] going to make sure that [Townsend] don't come to work [during the strike]." The Respondent discharged Cherry shortly after the strike ended for threatening employees about coming to work during the strike. The judge found the statements attributed to Cherry too ambiguous to be considered threats of bodily harm.

At issue is whether the statements attributed to Cherry were threats of bodily harm, which would constitute serious misconduct justifying the Respondent's refusal to reinstate her under the standard set forth in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). In applying *Clear Pine*, the Board has drawn a distinction between statements made by strikers that can reasonably be construed as threats, see, e.g., *Chesapeake Plywood*, 294 NLRB 201, 219 (1989) (striker, among other threats, shouted to other strikers to "drag the son-of-a-bitch out of his pick-up truck" and "I'll stump his godamned [sic] ass"), and statements that are too vague to constitute a threat. A comparison of *Georgia Kraft Co*., 275 NLRB 636, 636–637 (1985), and *Wayne Stead Cadillac*, 303 NLRB 432, 436 (1991), illustrates how the Board has drawn the line between threats and ambiguous statements.

In *Georgia Kraft,* supra, strikers went to the home of a nonstriking employee and told him "we'll take care of you [if you return to work]." The Board found the surrounding circumstances—the strikers were drunk, cursed in front of the nonstriker's pregnant wife and young daughter, and refused repeated requests to leave—were coercive and intimidating. Taking into account the context, the Board found the strikers' "take care of you" statement was not ambiguous, but rather a threat of bodily harm.

In *Wayne Stead Cadillac,* supra, a striker told another striker's wife that her husband should reconsider returning to work because he "could get hurt." The Board adopted the judge's finding that this statement was too ambiguous to be considered serious misconduct for which the striker could be discharged. The judge observed that the "take care of you" remark in *Georgia Kraft* conveyed that the speaker would take action against the person addressed and it was clear from the surrounding circumstances that the action threatened was to cause injury. In contrast, the person who "could get hurt" was not the person addressed. And, as the judge observed, the speaker could have been referring to the nonstriker's future relationship with the speaker and other strikers, if the nonstriker returned to work. Finally, contrary to the facts in *Georgia Kraft*, the judge could find nothing in the surrounding circumstances that made clear the striker intended the "could get hurt" statement to be a threat to cause bodily harm.

Other cases illustrate the importance of context in determining whether a statement is a threat of bodily harm warranting refusal to reinstate a striker. For example, in *Midwest Solvents, Inc.*, 251 NLRB 1282 (1980), enfd. 696 F.2d 763 (10th Cir. 1982), the Board found that a striker's statement to a nonstriking employee to "watch" himself because "some of the boys might get rowdy" was "noth-

[8] Our colleague asserts that the Respondent offered Duncan a full-time job. The only "job" the Respondent offered Duncan of which we are aware was the "weekends' and holidays'" offer. This can hardly be called a good-faith offer of a full-time position. Duncan testified that he had never heard of such a schedule, and the pay was $4 an hour less than what he had been receiving from the Respondent. Duncan, reasonably in our estimation, testified that he did not consider the offer serious and rejected it.

[9] The dissent argues that the Respondent satisfied its *Wright Line* burden by showing that "the lawful hiring of others was the event that resulted in the reduction of hours for Duncan." We disagree. "Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason" for taking the action in question; rather, it "must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). For the reasons set forth above, we find that the Respondent has failed to show that it would have eliminated Duncan's hours in the absence of his union activity.

ing more than the type of impulsive, trivial misdeed which we have found, in the past, to be insufficient to warrant a denial of reinstatement."[10] Although the Board's decision predated *Clear Pine*, the Tenth Circuit's enforcement of the Board's holding was based on the principle that eventually was adopted in *Clear Pine*. According to the court, "In the absence of other threatening statements or of some coercive action, this statement [was] too ambiguous to be considered a threat." The court continued, "At best, [the striker] attempted to dissuade [the non-striking employee] from continuing to work during the strike. That was his right, and [the Respondent] cannot refuse to reinstate him for that reason." 696 F.2d at 766–767.

Based on the precedent cited above, we find the statements attributed to Cherry were too ambiguous to be considered threats. Cherry's statements were, no doubt, attempts to dissuade Mascary and Townsend from continuing to work during the strike. Neither statement, however, was, objectively speaking, an unambiguous threat to cause bodily harm. Nor do we believe that the surrounding circumstances—the strike was not marred by any instances of violence—supply the context in which to find Cherry

intended her statements to convey a threat of bodily harm.[11]

In sum, we agree with the judge that the statements were not sufficiently unambiguous to be considered threats of bodily harm. Thus, we find that Cherry's conduct would not, under the circumstances existing, reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. *Clear Pine*, 268 NLRB at 1046. Therefore, the Respondent violated Section 8(a)(3) and (1) when it discharged her.

[10] See also *Calliope Designs*, 297 NLRB 510, 521 (1989) (striker's statement to nonstriker that he would be sorry if he did not join the strike was common banter with no violent connotation), and *Hotel Roanoke,* 293 NLRB 182, 210–211 (1989) (striker Bonnie Finney's statement, "I'll beat your ass," absent surrounding circumstances suggesting the words should be taken seriously, does not warrant refusal to reinstate Finney; by contrast, striker Ralph Hayes' statement that he "would kill" an employee if the employee reported Hayes, given Hayes' unauthorized entry on employer property, was a serious threat that warranted refusal to reinstate Hayes).

[11] Our colleague, practicing a form of guilt by association, finds it likely employees would have believed Cherry was making a threat because Lucretia Elibox-Jupierre, another striker, threatened to beat up employees if they went to work during the strike. Absent surrounding circumstances making it likely that Cherry's, at best, ambiguous statements were intended to be threats, we cannot agree that Cherry's statements should be interpreted in light of Elibox-Jupierre's conduct. There is no evidence suggesting a conspiracy between Cherry and Elibox-Jupierre to engage in threatening or intimidating behavior.

ORDER

The National Labor Relations Board orders that the Respondent, Briar Crest Nursing Home, Ossining, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally and without bargaining with 1199 National Health & Human Service Employees Union changing the work schedules of its employees.

(b) Eliminating work hours of employees because of their support for the Union.

(c) Discharging economic strikers because of a mistaken belief that they have engaged in strike misconduct.

(d) Issuing disciplinary warnings to employees because of their protected concerted activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Patrick Duncan and Tessie Cherry full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Patrick Duncan and Tessie Cherry whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to unlawful actions against Patrick Duncan, Terry Ransom, and Tessie Cherry, and within 3 days thereafter notify them in writing that this has been done and that such actions will not be used against them in any way.

(d) Rescind the unilateral change in work schedules of the employees in the activities department.

(e) On request, bargain with the Union regarding any changes in wages, hours, or other terms and conditions of employment in the following unit:

> All full-time and regular part-time non-professional employees, inclusive of employees classified as certified nursing attendants, feeders, dietary aids, housekeepers, activities aides, office clerical, clinical records clerk, receptionists, assistant bookkeepers, licensed practical nurses, maids, laundresses, maintenance workers and porters, employed by the Employer at its facility located at 31 Overton Road, Ossining, New York, excluding all other employees, including professional employees in Voting Group A,

as well as guards, confidential employees, managerial employees and supervisors as defined in the Act.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Ossining, New York facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 1997.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

Although I agree with my colleagues in other respects, I would reverse the administrative law judge and dismiss allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by reducing employee Patrick Duncan's hours of work and by discharging employee Tessie Cherry. I conclude, for the reasons stated below, that the General Counsel has failed to establish that Duncan's loss of hours was motivated by his union activities. I further conclude that striker Cherry engaged in misconduct which warranted her discharge.

1. The evidence establishes that the Respondent hired Duncan, who had sought a permanent position, as a part-time licensed practical nurse (LPN) on August 12, 1996. Duncan was a per diem employee and did not have any regularly scheduled hours, but often worked 3–4 days per week on the evening shift that ran from 3:30 until 11:30 p.m. After the organizing campaign began, Duncan signed a union card and spoke to other employees about the asserted benefits of union membership. The Respondent has admitted that it knew Duncan was a union adherent. On November 20, 1996, the Union won an election among the Respondent's nonprofessional employees. The Respondent filed election objections, but the Board overruled them and certified the Union on June 12, 1997.[1]

On January 20, 2 months after the election, the Respondent hired Sabrina Allen as a full-time LPN on the evening shift. At that time, Duncan normally worked only on weekend evenings because he was attending school, learning to become a massage therapist. The Respondent hired another full-time LPN, Velda King, on January 27. The record shows that the Respondent posted notices for these LPN openings in accordance with its usual practice. Although the postings were located near the timeclock that employees punched each shift, Duncan testified that he did not see them.

In February, Barbara Rusinko, the Respondent's director of nursing, informed Duncan that there probably would not be much work for him in light of the recent hires. Duncan told Rusinko that he wanted to become a full-time employee instead of a per diem employee. When Duncan asked why the Respondent had not given him a full-time slot, Rusinko replied that, "You didn't show any interest in it because you didn't apply." Duncan claimed that he had not seen the job posting. Rusinko stated that she did not have a full-time opening for Duncan at that time.[2]

Thereafter, the Respondent reduced the hours that Duncan worked. In April, Duncan interviewed for a full-time job after a day-shift LPN had resigned in March. Rusinko offered Duncan a full-time position that included working every weekend and on holidays. Duncan declined this offer.

In finding that the Respondent's reduction of hours of employee Duncan violated the Act, the judge noted that Rusinko did not consider Duncan for full-time employment when it hired both Allen and King. The judge noted, however, that Duncan did not express any interest in these jobs, i.e., the jobs filled by Allen and King. Despite Duncan's lack of interest, the judge found that "it would have been easy enough to ask Duncan [if he wanted the full-time position] and probably easier than posting a notice and going through an interview and training process." The judge then speculated that the Respondent's disinterest in hiring Duncan as a full-time employee may have resulted from the Respondent's concern that if the Board

[12] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are in 1997, unless otherwise noted.

[2] The complaint does not allege an unlawful refusal to hire Duncan for the full-time positions.

sustained its pending election objections and directed a new election Duncan's prounion vote could decide the rerun election. Therefore, based on the Respondent's failure to offer Duncan the job, its alleged union animus, Duncan's known support of the Union, and Rusinko's acknowledgement that Duncan was a good employee, the judge found that the Respondent unlawfully reduced Duncan's hours.

Contrary to the majority and the judge, I do not find that the General Counsel has sufficiently demonstrated the connection between Duncan's union activities and the Respondent's reduction of his hours. I think it clear that the reduction of hours resulted from the fact that two new full-time employees had been hired. As noted above, the complaint does not allege that the Respondent unlawfully refused to hire Duncan for these positions. Nor would any such allegation have merit. It is true that Duncan had sought a full-time position when the Respondent hired him as a per diem employee in mid-August 1996. Yet, nearly 6 months passed before openings became available in January 1997. By this time, Duncan was a student taking massage therapist classes and may not have been readily available for full-time work. Significantly, Duncan did not apply for the full-time jobs filled by Allen and King.

My colleagues say that Duncan had shown, at various times, an interest in full-time employment. Assuming arguendo that this is so, the fact is that Duncan did not apply for the full-time jobs posted in January. Although these postings were located near the timeclock that all employees punch each shift, Duncan says that he did not see the postings. Even accepting this dubious claim, the critical fact is that Duncan did not apply for these positions. My colleagues seem to quarrel with this critical fact. But, even Duncan does not say that he applied for these jobs. Rather, he simply explains that he did not apply because he did not see the postings. Finally, as noted above, even the General Counsel does not allege that the failure to hire Duncan for the two full-time jobs (or any full-time job) was unlawful.

As discussed, it was the filling of the two full-time jobs that reduced the need for on-call services at the nursing home. Concededly, the full-time hires did not entirely eliminate the need for on-call services. In this regard, my colleagues note that the on-call services of employee Lynette Hunter were retained. However, there is no evidence of unlawful discrimination as between Hunter and Duncan. For example, there is no showing that Hunter was a nonsupporter of the Union.

In light of the above, it is clear that the General Counsel has not established a prima facie case that the Respondent reduced Duncan's hours for discriminatory reasons. The General Counsel's theory (that the Respondent did not want Duncan to be an eligible voter in a possible second election) is based on pure speculation. Moreover, even if the General Counsel has shown that a reason for the reduction in hours was union activity, the Respondent has shown that, in any event, the lawful hiring of others was the event that resulted in the reduction of hours for Duncan. In my view, the Respondent did not merely show that it had a legitimate reason for its reduction of Duncan's hours. Rather, it established that it would have taken the same action even in the absence of any union activity.

2. The Respondent had employed Tessie Cherry as a certified nursing assistant (CNA) since 1986. In early December, the Union called a 2-day strike among nonprofessional employees in the bargaining unit. Cherry told fellow employee Olga Mascary that if Mascary went to work during the strike Cherry would get employee Lucretia Elibox-Jupierre on her "a—" or "tail." Another employee, Heather Townsend, testified that Cherry had told her that she was going to make sure that Townsend did not go to work during the strike. On December 4, after the strike ended, the Respondent discharged Elibox-Jupiere and suspended Cherry for strike misconduct. The Respondent subsequently advised Cherry, on December 10, that she was terminated because she had threatened employees about coming to work during the strike.

While noting that the Respondent "had met its burden of going forward," the judge concluded that the General Counsel had successfully established that Cherry did not engage in any "serious strike misconduct" that would justify her discharge. In the judge's view, Mascary and Townsend did not testify that Cherry had made any "unambiguous threats" to them. The judge found that Cherry, at most, had threatened Mascary that she would get Elibox-Jupierre on her "a—" if Mascary reported for work during the strike. Based on the view that the statements attributed to Cherry were too ambiguous to constitute a threat, the judge concluded that Cherry's discharge violated Section 8(a)(3).

It is well established that in cases involving either the discharge or a refusal to reinstate strikers for having engaged in alleged acts of strike misconduct the General Counsel's threshold burden is to establish (1) that a worker was, in fact, a striker and (2) that his employer took some action against him for conduct associated with the strike. *Laredo Coca Cola Bottling Co.,* 258 NLRB 491, 496 (1981). When the General Counsel has established this prima facie case of a violation, the burden shifts to the respondent-employer to show that it had an *honest belief* that the employee disciplined was guilty of strike misconduct that was serious in nature. *NLRB v. Champ Corp.,* 933 F.2d 688, 700 (9th Cir. 1991), cert.

denied 502 U.S. 957 (1991); *Gem Urethane Corp.,* 284 NLRB 1349, 1352–1353 (1987). If the respondent meets that burden, the General Counsel must show that the employee was innocent of the misconduct.

In the instant case, the Respondent has shown an honest belief that Cherry engaged in misconduct. In response, the General Counsel does not dispute the fact of misconduct. Rather, the General Counsel argues that the misconduct was not serious enough to warrant discharge. I disagree with this contention.

In *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986), the Board adopted an objective test for determining whether strikers had engaged in strike misconduct that was sufficient to bar reinstatement. The Third Circuit Court of Appeals formulated such a test in *NLRB v. W. C. McQuaide*, 552 F.2d 519 (3d Cir. 1977), on remand 237 NLRB 177 (1978), supplemented by 239 NLRB 671 (1978), enfd. 617 F.2d 349 (3d Cir. 1980). The court in *W. C. McQuaide* held that an employer need not "countenance conduct that amounts to intimidation and threats of bodily harm."[3] In determining whether verbal threats by strikers directed to fellow employees justify an employer's refusal to reinstate, the criterion is "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[4]

Applying the principles of *W. C. McQuaide* and *Clear Pine* to the present case, I conclude, contrary to my colleagues and the judge, that Cherry's remarks to employees Mascara and Townsend effectively constituted a threat of violence. As stated, Cherry told employee Mascary that, if Mascary went to work during the strike, Cherry would get fellow employee Elibox-Jupierre on her "tail." This clearly was no "ambiguous" statement, as the judge described it.

Both the judge and the Board find that the Respondent lawfully discharged Elibox-Jupierre for threatening employees, including Mascary and Townsend, that she would beat them up or damage their vehicles if they went to work during the strike. The evidence shows that Cherry and Elibox-Jupierre acted in concert when they attempted to intimidate their fellow employees into supporting the Union's strike. Indeed, Mascary and Townsend were among a number of employees who complained to the Respondent's supervisor, Barbara Vetolus, about Cherry's and Elibox-Jupierre's conduct. Given these circumstances, I find that Mascary would reasonably believe that Cherry was capable of influencing Elibox-Jupierre's conduct. Mascary would also understand, from Cherry's menacing remarks, that Cherry was making a threat, like those which Elibox-Jupierre, herself, had made directly, that the latter would inflict on her either personal injury or property damage. Further, based on the evidence of Elibox-Jupierre's direct threats and her connection with Cherry as the employee leaders of the strike movement, I find that Cherry's statement (that she was going to make sure that Townsend did not report for work during the strike) constitutes another threat of unspecified violence that was designed to interfere with Townsend's Section 7 right to refrain from union activity.

My colleagues argue that Cherry's remarks were not threats of physical harm. The argument is plainly without merit. Employer Elibox-Jupierre had threatened to beat up employees who worked during the strike. Cherry told Mascara that Elibox-Jupierre would be on her "a—" or "tail" if Mascara worked during the strike. In these circumstances, Cherry was telling Mascara that going to work would result in physical harm from Elibox-Jupierre. In addition, the remark to Townsend must be viewed in the same context.

Contrary to the majority, I am not suggesting a "conspiracy" between Elibox-Jupierre and Cherry, or a "guilty association," I am simply placing Cherry's remarks in the context of what Elibox-Jupierre had said to others.

Thus, based on Cherry's threats to Mascary and Townsend, I find that the Respondent has established that Cherry, like her cohort, Elibox-Jupierre, engaged in strike misconduct that was sufficient for the Respondent to discharge her following the strike. In deciding discrimination cases, the Board may not substitute its business judgment for an employer's. The Respondent in this case carefully reviewed Cherry's conduct during her suspension and legitimately concluded that she had made serious threats that precluded her reinstatement.[5] Accordingly, I would also dismiss this allegation of the complaint.

[3] 522 F.2d at 527.

[4] Id. at 528 (quoting *Operating Engineers Local 542 v. NLRB*, 328 F.2d 850, 852–853 (3d Cir. 1964), cert. denied 379 U.S. 826).

[5] Contrary to the judge, I find that the present case is distinguishable from *Wayne Stead Cadillac,* 303 NLRB 432, 435–436 (1991). In that case, employee Jerry Schrader said that he was "afraid that [another] employee could get hurt" if he crossed the picket line. Schrader did not say that he would inflict or cause the harm. Here, by contrast, Cherry made two threats of unspecified harm to employees Mascary and Townsend. This case is more like *Georgia Kraft Co.,* 275 NLRB 636 (1987), supplemented by 288 NLRB 29 (1988), in which the Board found that the employees' remarks that they would "take care of" a nonstriker if he returned to work constituted serious strike misconduct that warranted the strikers' discharge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally and without bargaining with 1199 National Health & Human Service Employees Union change your work schedules.

WE WILL NOT eliminate your work hours because of your support for the Union.

WE WILL NOT discharge economic strikers because of a mistaken belief that they have engaged in strike misconduct.

WE WILL NOT issue disciplinary warnings to you because of your protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Patrick Duncan and Tessie Cherry full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick Duncan and Tessie Cherry whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful actions against Patrick Duncan, Terry Ransom, and Tessie Cherry, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that such actions will not be used against them in any way.

WE WILL rescind the unilateral change in work schedules of the employees in the activities department.

WE WILL, on request, bargain with the Union regarding any changes in wages, hours, or other terms and conditions of employment in the following unit:

All full-time and regular part-time non-professional employees, inclusive of employees classified as certified nursing attendants, feeders, dietary aids, housekeepers, activities aides, office clerical, clinical records clerk, receptionists, assistant bookkeepers, licensed practical nurses, maids, laundresses, maintenance workers and porters, employed by us at our facility located at 31 Overton Road, Ossining, New York, excluding all other employees, including professional employees in Voting Group A, as well as guards, confidential employees, managerial employees and supervisors as defined in the Act.

BRIAR CREST NURSING HOME

Karen Newman, Esq. and *Joshua Zuckerberg, Esq.,* for the General Counsel.
James Dean, Esq., for the Respondent.
Sally Otos, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on May 18–22, 1998. The charge and amended charge in Case 2–CA–30131 were filed on February 20 and March 13, 1997. The charge in Case 2–CA–30283 was filed on April 8, 1997. The charge and amended charges in Case 2–CA–30258 were filed on April 1 and 24 and July 2, 1997. The charge in Case 2–CA–30993 was filed on December 4, 1997. And the charge in Case 2–CA–31167 was filed on January 5, 1998. A complaint in Case 2–CA–30131 was issued on August 15, 1997, and a consolidated complaint in all of the above cases was issued on February 10, 1998. In substance the allegations as amended at the hearing are as follows:

1. That pursuant to an election held on November 20, 1996, the Union was certified as the exclusive collective-bargaining representative on June 12, 1997.

2. That on November 1996, the Respondent, by its supervisors, Ellen Enriquez and Barbara Rusinko, directed employees not to talk about the Union.

3. That in mid-November 1996, Barbara Rusinko, the Respondent's director of nursing, interrogated employees regarding their union activities and sympathies.

4. That in February 1997, Respondent for discriminatory reasons, eliminated the scheduled work hours of Patrick Duncan.

5. That on December 4 and 8, 1997, the Respondent for discriminatory reasons, discharged Lucretia Elibox-Jupierre and Tessie Cherry.

6. That on December 5, 1997, the Respondent for discriminatory reasons, issued a disciplinary warning to Terry Ransom.

7. That in or around January 1997, the Respondent unilaterally and without bargaining, changed the work schedules for employees in the activities department.

At the opening of the hearing the General Counsel withdrew paragraph 10 of the complaint regarding Barbara Vassallo. The grounds were this individual's refusal to cooperate.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union commenced an organizational campaign amongst the professional and nonprofessional employees of the Respondent in August 1996. Pursuant to petitions filed on September 24, 1996, elections were held on November 20, 1996. The professional employees voted against representation and the nonprofessionals voted in favor of the Union. The vote in the nonprofessional unit was 51 in favor of representation, 42 against, and 4 challenged ballots. The Employer thereupon filed objections to the election that was won by the Union but these were overruled by the Regional Director in April 1997. On appeal, the Board upheld the Regional Director's decision and on June 12, 1997, the Union was certified as the exclusive bargaining representative for the nonprofessional employees. Bargaining started in September 1997.

During the course of bargaining, the Union called a 2-day strike on December 2 and 3, 1997. As of the time of the hearing herein, the parties had yet to reach an agreement. There is, however, no allegation in this case that the Company has failed to bargain in good faith.

B. Unilateral Change

In January 1997, the Respondent notified employees in the activities department that there would be changes in their work schedules. They were told that they would have to work every other weekend, as well as one evening a week from 1 to 8 p.m. Previously, these employees worked from 9 a.m. to 4:30 p.m. and were assigned to work one evening per month. The change required employees to work one evening per week and one extra weekend per month.

The announcement of the change and its implementation were made without notification or bargaining with the Union. This is not surprising inasmuch as the Employer was, at the time, challenging the Union's victory by way of objections. Ultimately, however, the Board rejected the Employer's objections and the Union was certified.

The Board's position in this type of situation is quite clear and is set forth in *Casa San Miguel*, 320 NLRB 534, 598 (1995). As stated by the administrative law judge in an opinion adopted by the Board:

> It is settled law that when, as here, a majority of the voting unit employees cast their ballots in favor of union representation that a unilateral change in the employees' terms and conditions of employment made pending determination of the employer's objections to the election have the effect of bypassing and undermining the union's status as the employees' bargaining representative, in the event it is ultimately certified. Thus, the employer acts at its peril in making unilateral changes during this period and, if the union is ultimately certified, as it was in this case, the employer's unilateral changes violate Section 8(a)(5) and (1) of the Act, in the absence of a showing of compelling economic considerations. *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974).

As the changes in work schedules involves a material change in the employees' terms and conditions of employment[1] and as the Respondent has not shown compelling economic considerations to justify making this change without bargaining, I conclude that the Employer has violated Section 8(a)(5) in this regard.

C. Preelection Conduct

Although there was a settlement agreement executed by the Respondent covering certain alleged preelection conduct, the General Counsel put evidence of such conduct into this record for the purpose of establishing the Respondent's antiunion animus. Without detailing all this evidence, which was not controverted by the Respondent, suffice it say that the record shows, inter alia, that during the period of October and November 1996, the Respondent, by its owner, Samuel Klein (a) threatened to close the facility if the Union was selected as the bargaining representative; (b) threatened employees with discharge in they engaged in leafleting or campaigning on company property; and (c) created the impression that it was surveilling its employees' union activities.

D. Patrick Duncan

The complaint alleges that the Respondent violated Section 8(a)(3) of the Act by eliminating, in February 1997, the scheduled work hours for Duncan. Additionally, the complaint alleges that certain statements were made to Duncan by his supervisors in November 1996, which constituted violations of Section 8(a)(1) of the Act.

Patrick Duncan was hired on August 12, 1996, as a licensed practical nurse (LPN). Although seeking a permanent position, he was hired as a part-time per diem employee. In general, although he did not have any regularly scheduled hours, he tended to work 3 to 4 days per week during the evening shift of 3:30 to 11:30 p.m.

Prior to his hiring, Duncan had been employed elsewhere where he had been a shop steward for Local 1199 for 4–1/2 years. (Whether this was known by agents of the Respondent is not known by me.) In any event, Duncan testified that he signed an authorization card for the Union and was active in talking to other employees about the benefits of union membership. The Company concedes that it was aware that Duncan was a supporter of the Union although the evidence does not indicate that

[1] *Carbonex Coal Co.,* 262 NLRB 1306, 1313 (1982) (change in shift schedule affecting three employees); *Mitchellace, Inc*., 321 NLRB 191, 195 (1996) (change in hours held to be nontrivial change in shift starting times); *Blue Circle Cement Co*., 319 NLRB 954 (1995) (change in start times); and *Carpenters Local 1031*, 321 NLRB 30 (1996) (change requiring employee to work one-half hour more per day).

he was active to the extent of employees Terry Ransom, Lucretia Elibox-Jupierre, and Tessie Cherry.

Duncan testified that in October 1996 he had a conversation with Sam Klein about a loan during which Klein offered to bet him $1 that the Union would not get into the shop.

Duncan also testified that in November 1996 he was told by Supervisor Wendy Charo that although she did not mind if he spoke to others about the Union on his time she did not want him talking about the Union on companytime. He states that he responded that this was on his time, but that she said that the other workers were on duty and had better things to do. Later in the day, Supervisor Ellen Enriques and Barbara Rusinko, the director of nursing, told him that they were aware of the incident with Charo and did not want this to happen again. No further action was taken on this matter and Duncan did not receive any sort of discipline. Nor was he threatened with discipline for any future infraction. Additionally, the General Counsel does not allege in this case that the Employer has maintained or enforced any kind of invalid no-solicitation rule.

According to Duncan, sometime in early to mid-November 1996, Supervisor Pupino told him that she was seeking to have everyone vote. Duncan states that during this conversation Pupino said that she could not ask him how he was going to vote, but she put out her hands in a manner which suggested that she was asking a question. Duncan said that she could not ask him and he was not going to tell.

Duncan testified that in mid-November 1996, shortly before the election, he had a conversation with Rusinko in which she asked him what he thought were the chances of keeping the Union out. Duncan states that he responded that he did not think that the Company had a snowball's chance in hell. Duncan further testified that Rusinko asked if there was anything that would persuade Duncan to vote against the Union. (It is this incident that the General Counsels assert, in their brief, as constituting unlawful interrogation.)

In any event, the election was held on November 20, 1996, and the Union obtained a majority of the votes in the nonprofessional unit which included Duncan's classification. After that, a period of quiescence set in, during which time the Employer's objections to the election were pending before the Board.

The evidence shows that on or about January 20, 1997, the Company hired Sabrina Allen as a full-time LPN on the shift that Duncan normally worked. This position was posted by the Respondent on January 16, 1997, although Duncan and several other employees testified that they did not see the posting. Duncan testified that in early February 1997, Rusinko told him that his position was filled and there probably would not be much worktime available for him. Duncan states that he told Rusinko that he had made it clear that he wanted to go from being a per diem employee to a full-time employee. The consequence of hiring Allen was that the number of hours available to Duncan was drastically reduced.[2]

[2] The record also shows that another person, Velda King, was hired as a full-time LPN on January 27, 1997.

Subsequently, in April 1997, Duncan interviewed with Rusinko about another LPN position[3] and was offered one which involved working every weekend and on holidays. Duncan testified that she told him that she had filled a full-time position that morning and was offering this as an alternative. Duncan refused the offer, testifying that in his opinion, this was not a serious offer.

The question I had was why Rusinko did not at least offer the full-time job to Duncan instead of going to the trouble of interviewing and hiring outsiders such as Sabrina Allen and Velda King? After all, Rusinko conceded that that she considered Duncan to be a good worker and that there was nothing in his work or personality to which she objected.

It is true that in January 1997 Duncan was attending school to learn to be a massage therapist and generally worked only on weekends during the evening. Nevertheless, he had earlier expressed his annoyance at being kept on as a per diem, as opposed to a full-time employee. (See R. Exh. 4 which contains Duncan's somewhat sarcastic response to his evaluation which, in overall terms, was positive.) Had he been offered a full-time position, Duncan might have reevaluated his priorities.

The point is, however, that Rusinko, simply did not consider Duncan for the full-time positions that were offered in January 1997 to either Sabrina Allen or Velda King, ostensibly because after posting a notice, Duncan did not express any interest in the positions. But it would have been easy enough to ask Duncan and probably easier than posting a notice and going through an interview and training process. Had Rusinko maintained any qualms about Duncan's job performance or about his somewhat sarcastic attitude, this might have been a reason. But, according to Rusinko, neither was the case.

At the time of these events, the election had been held but the Employer had filed objections which were pending before the Regional Director. The election amongst the nonprofessional employees was relatively close and a swing of five votes would change the outcome. Assuming as I do that the Employer's objections were filed in good faith and not simply to delay a certification, the Employer, as of January and early February 1997, must have entertained some hope that the election might be set aside and that another election would be held in the future. The Employer would then have at least a reasonable chance of winning a rerun election if there was turnover among the employees in the unit. Moreover, its chances would be even better if that turnover came about with the loss of people such as Duncan who had openly expressed their prounion position.

The above is the scenario that I believe motivated the employer in its decision not to offer Duncan a full-time position and to essentially eliminate his hours by hiring someone else. In this regard, I note the evidence showing (a) antiunion statements made by Klein before the election; (b) the Employer's knowledge of Duncan's support for the Union; and (c) Rusinko's acknowledgement of his good job performance. What is more, I really do not understand why it was so difficult to simply ask Duncan if he was interested in the full-time jobs that were filled by others in late January 1997. In short, I don't believe that the

[3] The record shows that Elaine Barkley, a day-shift LPN, resigned in March 1997.

decision to not offer him either job was because he had not expressed any interest in them. Therefore, and in accordance with *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), I find that the Employer violated Section 8(a)(1) and (3) of the Act by reducing his hours of work, which was a consequence of hiring others to full-time LPN positions in his stead.

Notwithstanding the above, I do not conclude that the alleged statements by Rusinko to Duncan in November 1996, amounted to illegal coercive interrogation inasmuch as Duncan was an open union supporter and no coercive remarks accompanied the interrogation. *FMC Corp.,* 290 NLRB 483, 485 (1998); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); and *Associacion Hospital del Maestro,* 267 NLRB 237, 238 (1983). Similarly, I do not think that the "directive" to Duncan that he should not solicit for the Union on the worktime of other employees constitutes a violation of the Act. *Associacion Hospital del Maestro*, supra; *Our Way Inc*., 268 NLRB 394 (1983) (a prohibition on solicitations in the work place on "worktime" as opposed to work hours would be presumptively legal).

E. Tessie Cherry, Lucretia Elibox-Jupierre, and Terry Ransom

Tessie Cherry has been employed as a certified nursing assistant (CNA) since 1986. Lucretia Jupierre was employed as a CNA for 4 years. Terry Ransom began her employment with the Respondent as a CNA in September 1973.

The Respondent acknowledges that it was aware that all three of these employees were very active union supporters.

The events that led to the discharges of Cherry and Jupierre and the discipline of Ransom all relate to a 2-day strike that took place on December 2 and 3, 1997. In accordance with Section 8(g) of the Act, the Union had given at least 10 days notice of this strike and the notice was delivered by Jupierre.

Barbara Vetolus, then the day supervisor, testified that before the strike, Alethea Smith, a CNA, told her that a few of the employees had been threatened with bodily harm and threatened with fines and loss of jobs if they came to work during the strike. Vetolus testified that Smith attributed these threats to Cherry and Jupierre and said that they had been directed to Olga Mascary. According to Vetolus, she asked Mascary about these threats and was told that Jupierre and Cherry had said that she would be beaten up and have her car damaged if she went to work. She also states that Mascary said that she was told that if she went to work during the strike she would be fined and lose her job.

Vetolus testified that on the day before the strike she received a phone call from Heather Townsend who stated that although she was afraid to come in she was nevertheless going to report to work on December 2. According to Vetolus, on December 2, she got a call from Townsend from the police station who, while crying, gave a somewhat unclear account concerning Jupierre and Cherry. Vetolus states that later in the day, and pursuant to direction of Rusinko, she interviewed Townsend and after writing down what she said, asked Townsend to sign a report of what had happened. This report was signed by Townsend and offered into evidence as Respondent's Exhibit 1.

On December 2–4, 1996, Vetolus interviewed other nonstriking employees and obtained signed statements from Olga Mascary (R. Exh. 2), Alethea Smith (R. Exh. 3), Miroslawa Uram (R. Exh. 4), and Hyacinth Richards (R. Exh. 5). To varying degrees, these employees, in their statements and in their subsequent testimony, asserted that they had received or witnessed threats by Jupierre. These consisted of threats to burn or damage cars, threats to beat up employees, threats that employees would be fined if they went to work, and threats that employees would lose their jobs if they did not honor the strike.

On the other hand, although employees Townsend and Mascary reported statements made by Tessie Cherry which they considered to be threatening, their testimony indicates that even if made, the statements, by an objective standard, would be too ambiguous to amount to threats sufficient to warrant a discharge. Thus, in the case of Olga Mascary, she essentially testified that Cherry told her that if she went to work during the strike she would get Jupierre on her ass or tail. And in the case of Heather Townsend, she related that, at most, Tessie Cherry told her that she was going to make sure that she did not go to work during the strike. Also, although the statement signed by Alethea Smith asserts that Jupierre and Cherry threatened to beat up nonstrikers, she did not testify in this case.

Based on the statements gathered by Vetolus, John Goldsmith, the Respondent's administrator, decided on December 4, 1996, to discharge Jupierre immediately and to suspend Cherry pending further investigation. Goldsmith states that he also spoke directly to Heather Townsend and Miroslawa Uram.

On December 4, 1996, after the employees returned to work from the strike, Jupierre was directed to go to Goldsmith's office. She went, accompanied by Terry Ransom and met with Rusinko and Goldsmith. At this meeting, Goldsmith told her that she was fired and when Jupierre asked why, she was told that it was because she had threatened workers and had threatened to harm a car. At that point according to Jupierre, she asked whom she had threatened and asserted that she had the right to know. She was told that they didn't have to tell her who reported the threats. When Jupierre insisted on receiving her final paycheck before leaving the premises, the police were called and she was escorted from the office. *According to Jupierre's own testimony, when told that she was being discharged because of threats made to other employees, she did not deny making such threats*.

During this same meeting, after Jupierre was discharged, Ransom left the office and, while walking down the corridor, said on one or more occasions, "I can't believe that they just fired Lucretia." The Respondent asserts that Ransom said this several times as she walked down the hall and made the statement in a loud voice. Ransom, on the other hand, testified that she made the statement quietly. I suspect that each side is exaggerating the loudness or softness of her voice, but in any event, the evidence indicates that at the time, patients were having lunch behind closed doors and there is no credible evidence to show that the statements made by Ransom either interfered with patients or employees. On December 5, 1996, Rusinko sent the following memorandum to Ransom:

> On Thursday, December 4, 1997, you accompanied a fellow employee to a meeting with administration. During the meeting you hastily left and as you were heading for the

> doorway leading to the lower level, you announced loudly, to the 2West staff, the nature of the meeting. You told the staff, "Lucretia was fired because they said she harassed someone." This behavior is unacceptable and will not be tolerated. It is disruptive to the staff and residents.
>
> Therefore this is a written warning advising you that if another incident of this nature occurs, you will be terminated. Since you are a valued employee, I am confident that this will not occur again.

Tessie Cherry testified that on December 4, 1996, she received a call at home from Goldsmith who told her that she was being suspended for threatening a coworker. She testified that she asked how he could suspend her without asking her any questions.

On December 10, 1996, Goldsmith sent the following letter to Cherry:

> Upon further investigation, we have concluded that you did in fact threaten other employees about coming to work during the strike.
>
> This behavior cannot be tolerated; so we are terminating your employment as of this letter.

F. Discussion

Employees who engage in an economic strike are engaged in protected concerted activity and may not be discharged for that activity. Thus, strikers who unconditionally offer to return to work are entitled to their former jobs unless the employer has "legitimate and substantial business justifications" for refusing. *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375 (1967).

In situations where strikers are accused of misconduct related to the strike, the employer may refuse to recall strikers, but it has the burden of going forward to show that it had a reasonable good-faith belief that the conduct has been committed. If the employer meets that burden, then the General Counsel has the burden of proving that the striker or strikers did not actually engage in the conduct alleged. In *NLRB v Burnup & Sims, Inc*., 379 U.S. 21 (1964), the Court stated:

> We find it unnecessary to reach the questions raised under [Section] 8(a)(3) for we are of the view that in the context of this record [Section] 8(a)(1) was plainly violated, whatever the employer's motive. Section 7 grants employees, inter alia, "the right to self-organization, to form, join or assist labor organizations." Defeat of those rights by employer action does not necessarily depend on the existence of an anti-union bias. Over and over again the Board has ruled that [Section] 8(a)(1) is violated if an employee is discharge for misconduct arising out of protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred.
>
> . . . .
>
> In sum [Section] 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

Before 1984, the Board's position was that verbal statements, as opposed to physical acts of intimidation and coercion, would generally not be sufficient acts of misconduct to warrant the employer's refusal to reinstate a striker. The Board changed that position in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), affd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). The Board stated:

> In the past, the Board has held that verbal threats by strikers, "not accompanied by any physical acts or gestures that would provide added emphasis or meaning to [the] words," do not constitute serious strike misconduct warranting an employer's refusal to reinstate the strikers. On the other hand, the Board has held that verbal threats which are accompanied by physical movements or contracts such as hitting cars, do constitute serious strike misconduct. The Board summarized its standard . . . in *Coronet Casuals* [207 NLRB 304 (1973)], where it stated that "absent violence . . . a picket is not disqualified from reinstatement despite . . . making abusive threats against nonstrikers.
>
> . . . .
>
> We disagree with this standard because actions such as the making of abusive threats against nonstriking employees equate to "restraint and coercion" prohibited elsewhere in the Act and are not privileged by Section 8(c) of the Act.[4] Although we agree that the presence of physical gestures accompanying a verbal threat may increase the gravity of verbal conduct, we reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts. Rather, we agree with the . . . First Circuit that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker." We also agree with the . . . Third Circuit that an employer need not "countenance conduct that amounts to intimidation and threats of bodily harm."
>
> . . . .
>
> In deciding whether reinstatement should be ordered after an unfair labor practice strike, the Board has in the past balanced the severity of the employer's unfair labor practices that provoked the strike against the gravity of the striker's misconduct. We do not agree with this test. There is nothing in the statute to support the notion that striking employees are free to engage in or escalate violence or misconduct in proportion to their individual estimates of the degree of seriousness of an employer's unfair labor practices . . . . In the case of picket line and strike misconduct, we will do this by denying reinstatement and backpay to employees who exceed the bounds of peaceful and reasoned conduct. [268 NLRB at 1045–1047.]

Cases subsequent to *Clear Pine Mouldings,* have elucidated some of the types of behavior that would justify the discharge or failure to reinstate strikers and the apportionment of the respective burdens placed on the General Counsel and the Respondent.

In *Gem Urethane Corp*., 284 NLRB 1349, 1352 (1987), the Board, noted that: "At all times, the burden of providing dis-

[4] Presumably, the Board is referring to Sec. 8(b)(1)(A) of the Act.

crimination is that of the General Counsel." In this respect, the Board overruled the administrative law judge and said: "We find the Respondent acted in good faith and accordingly, that the judge improperly allocated the burden of proof by requiring the Respondent to prove the alleged strike misconduct on which it based its refusal to reinstate the 12 strikers." In applying *Clear Pine Mouldings,* the Board held that threats of assault would be sufficient to justify the refusal to reinstate strikers.

In *Axelson, Inc.,* 285 NLRB 862, 864 (1987), the Board reversed the administrative law judge's conclusions regarding the respondent's refusal to reinstate certain strikers because of alleged strike misconduct. One striker, Williams, allegedly brandished a revolver and threatened to kill two striker replacements. The judge found that the Respondent had not proven that Q. Ray Williams was the person who did this and therefore had not met the appropriate burden of proof. The Board disagreed with the judge's allocation of burdens and stated:

> We emphasize that *Rubin Bros.* [*Footwear,* 99 NLRB 610 (1952)], indicates that the respondent' s honest belief burden does not extend to proving that the strikers did in fact engage in the misconduct. Once an honest belief is established, it is for the General Counsel to demonstrate the strikers' innocence and thus establish that the respondent's conduct is illegal. To the extent that there is a lack of evidence on this issue, it must be resolved in favor of the employer, because the General Counsel has the burden of proof on this question. . . . . We also note that the *Rubin Bros*. procedure has been implicitly endorsed by the Supreme Court. See *NLRB v. Burnup & Sims*, 379 U.S. 21 at fn. 3.[5]

As a general matter, the cases since *Clear Pine Mouldings*, supra, to the extent that they deal with a striker's actual statements have fallen into two categories. On one side are statements which are obscene, scandalous, and tawdry. And on the other side are statements which could be construed as threats of bodily injury or property damage.

By and large obscene statements, in the absence of actual threats or accompanying coercive acts, have been held to be insufficient to justify a refusal to reinstate. *Catalytic, Inc*., 275 NLRB 97 (1995) (obscene hang-up phone call to nonstriker's wife); *Gloversville Embossing Corp*., 297 NLRB 182, 194 (1989) (male striker's flashing of female nonstrikers); *Calliope Designs*, 297 NLRB 510 (1989) (obscene statements to nonstriker in front of her daughter); and *Nickel Molding*, 317 NLRB 826 (1995), enfd. denied sub nom. *NMC Finishing v. NLRB,* 101 F.3d 528 (8th Cir. 1996) (obscene sign posted at exit of plant and directed toward one particular nonstriker).[6]

Where, however, statements made by strikers are reasonably construed as constituting threats of assault or threats to property, such statements are sufficient to justify a refusal to reinstate. *Georgia Kraft Co*., 275 NLRB 636 (1985); *Chesapeake Plywood Inc*., 294 NLRB 201 (1989); and *Axelson, Inc*., 285 NLRB 862 (1987). There are cases, however, where a statement was thought to be too vague to constitute a threat or where the circumstances were such that a reasonable person could not have viewed the statement as constituting a threat. For example, in *Wayne Stead Cadillac*, 303 NLRB 432, 435 (1991), a striker who told a nonstriker's husband that her spouse could get hurt if he went to work was considered to be too vague to constitute a threat of bodily harm.

Applying these cases to the present situation, it seems to me that the Employer has demonstrated that it had a reasonable basis for its belief that Jupierre and Cherry had engaged in conduct which included threats of bodily injury and threats to damage property. In this regard, the Employer's supervisors, after being notified by Alethea Smith and Heather Townsend, interviewed a number of employees, some of whom stated and signed statements to the effect that they had heard such threats by both individuals. Moreover, the Employer put some of these employees on the witness stand. The Employer has therefore met its burden of going forward on the reasonable basis question.

Accordingly, the General Counsel has the burden of proving either that the alleged conduct did not occur, or if it did occur, that it was not Jupierre or Cherry who made the statements.

With respect to Jupierre, the credible evidence presented by the Respondent shows that on several occasions she told employees that if they went to work during the strike she would beat them up and that their vehicles would be damaged or burned. [7] While Jupierre denied making such threats, I do not believe her. I note that when she was told that she was being discharged for making threats she did not deny doing so; instead asking the Company to tell her who reported the threats. As I conclude that these types of threats are sufficient to deny her reinstatement when the strike ended, I shall recommend that this allegation of the complaint be dismissed.

The situation is somewhat different as to Cherry. While I have concluded that the Employer has met its burden of going forward, I think that the General Counsel has, in this instance, successfully met the burden regarding the issue of whether Cherry actually engaged in serious strike misconduct. In this regard, the only persons who actually testified about statements allegedly made by Cherry (Mascary and Townsend), did not testify that she made any unambiguous threats. The closest thing to a threat was the statement to Mascary, who testified that Cherry told her that if she went to work during the strike she would get Jupierre on her tail. I do not think that this statement is sufficiently unambiguous to constitute a threat. (The out of court statement signed by Alethea Smith is hearsay as to the truth of the matter asserted; namely, that Cherry actually made a threat of bodily harm. Accordingly, it is my opinion that in the absence of Smith's testimony, Cherry's testimonial denial, trumps, Smith's hearsay assertion.)

Turning finally to Terry Ransom, she was not disciplined for any alleged strike misconduct. Rather, her discipline involved

[5] See also *Chesapeake Plywood*, 294 NLRB 201, 218, (1989), and *Clougherty Packing Co*., 292 NLRB 1139, 1142 (1989).

[6] In *General Chemical Corp*., 290 NLRB 76 (1988), the Board ordered reinstatement of a striker who, during a strike, called the employer's director of manufacturing a "liar," "crook," and a "thief."

[7] The evidence also shows that she told employees that if they did not strike they would be fined by the Union and would lose their jobs. It is not clear from the case law that such statements would or would not constitute misconduct sufficient to deny her reinstatement.

the events surrounding her alleged actions at the meeting where she was asked by Jupierre to represent her and where Jupierre was discharged. Clearly, Ransom's attendance at the meeting constituted protected concerted activity and was analogous to the situation where a shop steward is present to represent an employee who is about to be disciplined or discharged. Further, statements that she thereafter makes to other employees regarding or informing them of the discharge, would likewise be considered protected concerted activity. *Guardian Industries Corp*., 319 NLRB 542, 549 (1995).

Soon after Jupierre was told that she was being fired, Ransom left the room and while proceeding down the corridor was heard to say, "I can't believe they fired Lucretia." On its face, the warning was given to Ransom because she told employees that the employer had fired Lucretia.

The evidence shows that Ransom made the statement as she passed by the dining room where patients were having lunch. The dining room is behind closed doors and there was no evidence that any patients heard what she said or were troubled by it. There was no indication that Ransom's remarks had any disruptive impact of patient care or on the work being done by her coworkers. The statement was an understandable and spontaneous reaction to the discharge of Jupierre and was over in an instant. There is nothing in what Ransom did or said, which I would consider as constituting conduct which, by its character would make her concerted activity unprotected. Thus, in *Consumers Power Co*., 282 NLRB 130, 132 (1986), the Board stated:

> [W]hen an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for [further] service.[8]

[8] See also *Postal Service*, 250 NLRB 4 (1980), and *Postal Service*, 252 NLRB 624 (1980). However, contrast those cases with those where an employee engages in abusive and/or insubordinate conduct while also engaged in concerted activity. *Postal Service*, 268 NLRB 274 (1983); *Carolina Freight Carriers Corp*., 295 NLRB 1080 fn. 1 (1989); and *Postal Service,* 282 NLRB 686, 694–695 (1987).

CONCLUSIONS OF LAW

1. By unilaterally changing the work schedules for certain employees, without offering to bargain with 1199 National Health & Human Service Employees Union, the Respondent has violated Section 8(a)(1) and (5) of the Act.
2. By eliminating hours of work for Patrick Duncan in February 1997, because of his support for the Union, the Respondent has violated Section 8(a)(1) and (3) of the Act.
3. By discharging Tessie Cherry, an economic striker, because of its mistaken belief that she engaged in strike misconduct, the Respondent has violated Section 8(a)(1) and (3) of the Act.
4. By issuing a disciplinary warning to Terry Ransom because of her protected concerted activity, the Respondent has violated Section 8(a)(1) and (3) of the Act.
5. The Respondent has not violated the Act in any other manner encompassed by the complaint.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged or reduced the hours of work of employees Tessie Cherry and Patrick Duncan, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the effective dates of such actions to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Regarding the unilateral change, it is recommended that the Respondent rescind this change until such time as it bargains in good faith about it and either reaches an agreement or reaches an impasse on the issue.

[Recommended Order omitted from publication.]